

**FLEISCHMAN AND WALSH, L. L. P.**

**ORIGINAL**

ATTORNEYS AT LAW  
A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION  
1400 SIXTEENTH STREET, N. W.  
WASHINGTON, D. C. 20036  
TEL (202) 939-7900 FAX (202) 745-0916  
INTERNET www.fw-law.com

AARON I. FLEISCHMAN

FLEISCHMAN AND WALSH, P. C.  
CHARLES S. WALSH  
ARTHUR H. HARDING  
STUART F. FELDSTEIN  
JEFFRY L. HARDIN  
STEPHEN A. BOUCHARD  
R. BRUCE BECKNER  
CHRISTOPHER G. WOOD  
SETH A. DAVIDSON  
JAMES F. MORIARTY  
MATTHEW D. EMMER  
HOWARD A. TOPEL  
LOUIS H. DUPART\*  
SHARON O'MALLEY MONAHAN\*\*  
LAWRENCE R. FREEDMAN  
ERIC E. BREISACH\*\*\*

May 11, 2000

MAY 11 2000

JILL KLEPPE MCCLELLAND  
REGINA FAMIGLIETTI PACE  
CRAIG A. GILLEY  
SUSAN A. MORT  
MARK D. PIHLSTROM  
BETH-SHERRI AKYERKO  
BRIAN C. MALADY  
THOMAS E. KNIGHT  
SETH M. WARNER  
MARK B. DENBO+  
BRANDON H. HIRSCH  
CARA E. SHEPPARD  
STEVEN J. HAMRICK  
KEVIN C. BRENNAN  
FILOMENA D'ELIA  
ARDEN T. PHILLIPS+  
PATRICK L. GILMORE+  
RICHARD L. DAVIS  
S. JENELL TRIGG  
JENNIFER B. TOMCHIN  
SHARI L. WILKOZEK++  
LISA CHANDLER CORDELL

**VIA HAND DELIVERY**

Magalie R. Salas, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

\* VA BAR ONLY  
\*\* MA BAR ONLY  
\*\*\* MI BAR ONLY  
+ MD BAR ONLY  
++ IL BAR ONLY

**Re: CC Docket No. 00-50 – Response Comments of NewPath Holdings, Inc.**

Dear Secretary Salas:

Enclosed for filing with the Commission, please find an original and seven (7) copies of the Response of NewPath Holdings, Inc. in the docket referenced above. An additional copy of this filing has also been provided for date-stamp and return.

Please direct any questions concerning this filing to the undersigned at the address or phone number listed above. Thank you.

Sincerely,

*Laurence Freedman / rco*

Lawrence R. Freedman

Counsel for NewPath Holdings, Inc.

cc: Mick Herke (via overnight mail)  
Service List

No. of Copies rec'd 0 + 7  
List A B C D E

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

RECEIVED  
MAY 11 2000  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Petition of NewPath Holdings, Inc. )  
For an Expedited Declaratory Ruling on the )  
Scope of Unbundled Access to the )  
High-Frequency Portion of Loops )

CC Docket No. 00-50

**RESPONSE OF  
NEWPATH HOLDINGS, INC.**

May 11, 2000

Lawrence R. Freedman  
Richard Davis  
FLEISCHMAN & WALSH, LLP  
1400 16<sup>th</sup> Street, N.W.  
Suite 600  
Washington, D.C. 20036  
(202) 939-7923  
(202) 588-0095 (fax)

## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY .....	1
DISCUSSION .....	2
I.    The Express Terms of the Line Sharing Order .....	2
II.   Multiple-Carrier Line Sharing.....	4
III.  Operational Issues .....	5
IV.  OSS Modifications .....	8
V.   Mixing of UNEs and Resale.....	9
VI.  Reseller Permission to Share a Line.....	11
VII. No ILEC Data Access Advantage .....	13
VIII.Impairment Standard .....	14
IX.  Procedural Challenges .....	14
CONCLUSION .....	16

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of	)	
	)	
Petition of NewPath Holdings, Inc.	)	CC Docket No. 00-50
For an Expedited Declaratory Ruling on the	)	
Scope of Unbundled Access to the	)	
High-Frequency Portion of Loops	)	

**RESPONSE OF  
NEWPATH HOLDINGS, INC.**

**INTRODUCTION AND SUMMARY**

On March 14, 2000, NewPath Holdings, Inc. ("NewPath") initiated this docket with a petition for the Federal Communications Commission ("FCC" or "Commission") to definitively and quickly find that the line sharing obligations announced in the Line Sharing Order<sup>1</sup> and 47 C.F.R. § 51.319(h) include loops on which a carrier is reselling an ILEC's analog voice service ("resale loops"). On April 26, 2000, four ILECs<sup>2</sup> filed comments in opposition to NewPath's petition. In contrast, two CLECs<sup>3</sup> filed comments in full support of the petition. The Telecommunications Resellers Association ("TRA"), a large and prominent competitive provider trade organization, also filed comments in support of the key aim of the declaratory ruling sought by NewPath.

NewPath hereby responds to the ILECs' objections to NewPath's petition, as well the position taken by the TRA. As discussed further below, the ILECs and the TRA provide no

---

<sup>1</sup> In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, FCC 99-355 (rel'd December 9, 1999).

<sup>2</sup> ILEC comments were filed on behalf of Bell Atlantic, GTE Service Corporation ("GTE"), SBC Communications, Inc. ("SBC"), and U S WEST Communications, Inc. ("U S WEST").

<sup>3</sup> CLEC comments were filed on behalf of AT&T Corp. ("AT&T") and Sprint Corporation ("Sprint").

reason to deny, limit, or delay the declaratory ruling that NewPath seeks. Instead, the ILECs and the TRA have presented arguments against NewPath's petition that reprise positions the Commission rejected in the Line Sharing Order, misrepresent the context of language in the Line Sharing Order, and misinterpret and misapply both the law and the factual content of NewPath's petition. With this response, NewPath intends to show the Commission that these arguments are little more than smoke and mirrors designed to unduly distort and complicate an otherwise simple, logical, and pro-competitive interpretation of the Line Sharing Order. The Commission should grant NewPath's petition.

## **DISCUSSION**

### **I. The Express Terms of the Line Sharing Order**

A number of the ILECs argue that requiring unbundled access to the data portion of resale loops would be contrary to the "express" language of the Line Sharing Order. In particular, SBC represents that the Line Sharing Order "expressly held that ILECs must only make available the high frequency portion of the loop when the ILEC is providing the *retail* analog voice service on that loop."<sup>4</sup> GTE similarly states that the Line Sharing Order "explicitly and exclusively imposes the line sharing obligation only when the ILEC has a *direct, retail relationship* with the voice end-user."<sup>5</sup> Finally, Bell Atlantic simply argues, without further explanation, that the Line Sharing Order "makes clear" that an ILEC is not providing service on a resale loop.<sup>6</sup>

Contrary to SBC's and GTE's representations, *nowhere* in the Line Sharing Order is there any "express" finding that an ILEC's voice service on a loop must be "retail" voice service.

---

<sup>4</sup> SBC Comments at 2 (emphasis added).

<sup>5</sup> GTE Comments at 3 (emphasis added).

<sup>6</sup> Bell Atlantic Comments at 1-2.

Instead, in each instance in the Line Sharing Order where the Commission states this central limitation on an ILEC's unbundling obligations (including the instances recounted by SBC and GTE), the *only* requirement is that the ILEC is providing voice service, without distinguishing between retail and resale. In truth, any distinction between retail and resale service in the Line Sharing Order is solely a matter of ILEC implication and interpretation, not express Commission language as SBC and GTE now represent. Indeed, it is the very threat of this misinterpretation of the Commission's broad language that is at the heart of NewPath's petition.

In the ILECs' fervor to extol the clarity of the Commission's "express" limitation of line sharing to retail ILEC voice lines, they completely ignore the fact that all of the Commission's rationales for requiring line sharing support an interpretation of the Line Sharing Order that differs from their own. As NewPath explained in its petition, when the ILECs' narrow interpretation is, in fact, measured against the fundamental rationales and policies of the Line Sharing Order, the ILECs' interpretation is clearly arbitrary and tenuous.

The "express" language of the Line Sharing Order simply does not limit an ILEC's obligation to unbundle the data portion of loops on which the ILEC is the "retail" voice provider. In the absence of such an express limitation, the ILECs' attempt to "read in" this gloss which does not appear in the text of the Commission's order. This "reading" is contrary to the policy and rationales of the Line Sharing Order, which clearly support the interpretation and ruling that NewPath has requested.

The very fact that the ILECs have publicly stated their unfounded and anticompetitive "interpretation" of the rule underscores the need for the prompt and appropriate clarification NewPath now seeks. Absent prompt and decisive Commission action, NewPath expects the ILECs to resist an otherwise appropriate form of line sharing in their interconnection

negotiations and implementation. This will in turn delay and block an important market entry strategy in the area of advanced services. Such delay, always the incumbent monopolist's friend, is even more pernicious and harmful to competition in the fast-evolving and highly competitive advanced services area. If the Commission is serious about supporting the rapid introduction of competitive advanced services, particularly in underserved rural areas (a core target market for NewPath), it should grant NewPath's petition promptly.

## **II. Multiple-Carrier Line Sharing**

SBC and Bell Atlantic both argue that paragraph 74 of the Line Sharing Order undermines NewPath's petition because "it rejected the concept of ordering more than two-carrier line sharing."<sup>7</sup> Both ILECs argue that unbundled access to the data portion of resale loops will place three carriers on a single line – the voice reseller, the ILEC, and the data provider. In turn, both point to the Commission's observation in paragraph 74 that "the complexities involved in implementing line sharing dramatically increase where more than two service providers share a single loop."

SBC and Bell Atlantic have misrepresented the Commission's findings and concerns in paragraph 74. In particular, they have excerpted the only portion of paragraph 74 that conceivably supports their claims, while neglecting to include the rest of the Commission's discussion. This remaining discussion distinctly shows that the Commission's concerns about having more than two carriers on a single line were the "complex operational difficulties" of "multiple customers" or "multiple services."<sup>8</sup> Neither of these situations is involved in unbundling the data portion of resale loops. On resale loops, just as on ILEC retail voice loops,

---

<sup>7</sup> SBC Comments at 3; see also Bell Atlantic Comments at 3.

<sup>8</sup> Line Sharing Order at ¶¶ 74-75.

line sharing will involve simple analog voice service, a single requesting data carrier, and one customer per loop. As the title of paragraph 74 itself indicates (“Single Requesting Carrier, One Customer Per Loop”), this is exactly what the Commission envisioned line sharing to be. The ILECs’ sound-byte approach to interpreting paragraph 74 of the Line Sharing Order is misleading and presents no obstacle to granting NewPath’s petition.<sup>9</sup>

### **III. Operational Issues**

In conjunction with their claims under paragraph 74, or as a separate item in their comments, a couple of the commenting ILECs argue that unbundled access to the data portion on resale loops invokes complex operational questions, including trouble reports, interference, repairs, maintenance, service changes, and disconnection.<sup>10</sup> Notably, Bell Atlantic only raises these issues in arguing for a reasonable amount of time to address them if NewPath’s petition is granted. In contrast, U S WEST, the other ILEC raising these issues, seems to argue that such operational issues should keep the Commission from unbundling the data portion of resale loops altogether.

Each of the operational issues summarily raised by the ILECs are neither infeasible, nor, when critically examined, particularly complex. First, Bell Atlantic’s own comments reflect that, to the extent new operational questions are raised by unbundling the data portion of resale loops, implementation is simply a matter of time, not feasibility. Even U S WEST, with all of its protests, does not deny this fact.

Second, beyond summarily listing operational issues involved in line sharing, U S WEST does not explain why such issues would be so novel or complex. Indeed, a practical examination

---

<sup>9</sup> It should also be noted that the ILECs’ arguments under paragraph 74 do not even address the scenario where the voice reseller and the data UNE provider are the same carrier. In such case, even under the ILECs’ narrow misinterpretation of paragraph 74, there are no more than two providers on the line.

<sup>10</sup> Bell Atlantic Comments at 3.



of each of the issues raised by the ILECs shows that there is little or no practical change in the distribution of operational rights and responsibilities on shared resale loops from those discussed in the Line Sharing Order.

Trouble Reports and Repairs. As contemplated by the Line Sharing Order, when a customer encounters service problems on a loop, the customer will contact either the voice provider or data provider to investigate and repair the problem. Once this notice is given, the Line Sharing Order calls for the notified carrier to investigate whether the source of the trouble is in its own facilities, and if not, to notify the other carrier that the problem may be in the other carrier's facilities. Repair obligations are then assigned based on the result of these investigations. Adding a voice reseller to the equation does not appear to require any substantive changes to this procedure. If a customer reports a shared line trouble to a voice reseller, instead of the ILEC, the investigation and repair process in the Line Sharing Order is simply started with a trouble report from the reseller according to its existing resale agreement with the ILEC. Trouble reporting and repairs on shared resale loops does not require new or complex procedures.

Interference. In the Line Sharing Order, the Commission provided specific mechanisms for an ILEC and a data provider to address situations where data services cause interference with the voice services on a shared loop. These same protections and mechanisms will be available on shared resale loops. To the extent a data provider's services are significantly degrading the analog voice services on a resale loop, the reseller can avail itself of the procedures and protections of the Line Sharing Order with a trouble report submitted under its existing resale arrangements with the ILEC. No further procedures are required beyond those already

established in the Line Sharing Order and the ILECs' existing resale arrangements to remedy interference problems.

Maintenance. Under both traditional resale arrangements and the Line Sharing Order, the ILECs retain maintenance responsibility for their loop facilities. There is no need for additional, much less complex, maintenance procedures when in either the resale or retail voice scenario, the ILEC's line sharing maintenance obligations are the same.

Service Changes and Disconnection. Service changes and disconnection issues and procedures addressed in the Line Sharing Order also apply without distinction to resale loops. To the extent a resale voice customer on a shared loop wishes to change its voice service or receive the voice services of the ILEC or another reseller, the procedures to order and make this change are the same whether or not the line is shared by a data provider. Similarly, to the extent a customer wishes to change its data service or data provider on a resale loop, the actions to effectuate this change are not influenced at all by whether the underlying retail voice provider is the ILEC or a reseller. Finally, to the extent a customer wishes to discontinue voice service on a resale loop in its entirety or switch to a UNE-based voice provider, the Line Sharing Order allows the resident data provider to either lease the entire loop as a UNE, discontinue service, or, in the event a new UNE-based voice provider is introduced, seek to negotiate a voluntary line sharing agreement with the new voice provider. The service change and disconnection issues that arise for shared resale loops are in no way unique to resale loops. U S WEST's bald allegation that unbundled access to the data portion of resale loops will raise extensive

operational issues, is wholly unfounded, and presents no obstacle to granting NewPath's petition.<sup>11</sup>

The Commission has heard the same refrain from the ILECs time and again on operational issues in order to legitimize their foot-dragging in implementing competition. The Commission has, in the past, rejected similar claims as meritless, including most recently in the Line Sharing Order itself in connection with ILEC claims that OSS modifications would be lengthy and burdensome. These red herring claims should be rejected again here.

#### **IV. OSS Modifications**

In addition to the list of operational matters raised by U S WEST, U S WEST repeats its usual argument that requiring unbundled access to the data portion of resale loops would require expensive and time consuming OSS modifications.<sup>12</sup> Even if U S WEST's claims are correct, they are not a reason to deny NewPath's petition. The ILECs raised the same complaints about OSS modification time and expense in fighting line sharing in the first place. The Commission not only rejected the ILECs' inflated estimates of the time and expense required for line sharing OSS modification, it found that the time and expense required for such modifications was not enough to counterbalance the competitive need for line sharing. U S WEST has offered nothing to make its reprised argument any more credible or dispositive here. If unbundled access to the data portion of resale loops is otherwise warranted by the Commission's rationales in the Line

---

<sup>11</sup> Again, it should be noted that the ILECs' concerns about operational difficulties among carriers on shared resale loops, whether valid or not, are, in large part, not even implicated when the voice reseller and data UNE provider are the same carrier.

<sup>12</sup> U S WEST Comments at 5.

Sharing Order, U S WEST's complaints about OSS modification time and expense must fail again.<sup>13</sup>

## **V. Mixing of UNEs and Resale**

Bell Atlantic and U S WEST argue that unbundled access to the data portion of resale loops would be an improper mixing of UNEs and resale.<sup>14</sup> In particular, Bell Atlantic argues that UNEs and resale are "separate and distinct" service options under that Act, and that NewPath has failed to point to anything that would require an ILEC to allow both options on a single line. U S WEST further argues that allowing unbundled access to the data portion of resale loops is "unprecedented" and has not been examined for "technical feasibility, compliance with the Act, or common sense." Neither of the ILECs' arguments are valid reasons to deny NewPath's petition.

As for Bell Atlantic, its claims that NewPath has failed to point to anything in the Act that would allow the mixing of UNEs and resale on one line are backwards. While the Act establishes two distinct service options in UNEs and resale, Congress placed no limitation on these options like the one that Bell Atlantic is suggesting that the Commission graft into the Act. When critically examined, it is Bell Atlantic's proposed limitation that has no apparent basis in the unqualified language of Act. Moreover, Bell Atlantic's reliance on the FCC's finding that a carrier can provide service by UNEs to some customers and by resale to others to conclude that the two options cannot be used in conjunction on a shared line is entirely misplaced. First, Bell Atlantic's reasoning is, at best, a strained implication from an otherwise general statement about

---

<sup>13</sup> To the extent U S WEST complains about OSS modification costs, its arguments are rendered moot by the Line Sharing Order, which allows U S WEST to recover OSS modification costs subject to the terms of the Order. Moreover, to the extent U S WEST complains about time, delay in line sharing OSS modification only works to U S WEST's advantage, by delaying competition in the advanced services market.

<sup>14</sup> Bell Atlantic Comments at 3-4; U S WEST Comments at 3-5.

the flexibility offered providers under the Act. Second, it is highly doubtful that the Commission even contemplated Bell Atlantic's implication in language that predates the Line Sharing Order by over three years. Third, the tenor of the FCC's statement actually supports the combination of UNEs and resale in a carrier's business offerings more than suggest the limitation that Bell Atlantic urges.

The whole point under the Act in offering a "menu" of market entry options, such as resale, UNEs, and facilities-based service, is to provide maximum flexibility, encourage innovation, and facilitate the fastest possible market entry means through any combination of these options. Resale is often viewed as a preliminary way to offer voice service while a transition to facilities or other approaches are developed. These policies, and this approach, are wholly applicable here. A data provider looking to ultimately offer a bundled service package of data and voice may reasonably determine, as NewPath has, that it makes sense to use resale as a voice market entry strategy pending the better development of other voice options such as, for example, voice over IP. This is an appropriate use of the Act.

As for U S WEST, its claim that line sharing on resale loops is "unprecedented," even if true, provides no basis to deny NewPath's petition. Line sharing, in general, was unprecedented until the Commission found that competition required it in the Line Sharing Order. Since the same competitive rationales invoked in the Line Sharing Order apply to resale loops, U S WEST's claim is irrelevant. Moreover, U S WEST has not provided any basis to suggest that line sharing on resale loops is technically infeasible. No other ILEC has challenged the fact that line sharing on resale loops is technically feasible, and, indeed, at least Bell Atlantic has effectively conceded its technical feasibility by only arguing that it will need time to do it. Finally, the whole of NewPath's petition is a plea for "common sense." The rationales

announced in the Line Sharing Order apply without distinction to resale loops, yet the broad language of the Order invites a now-proven threat of ILEC resistance. The ILECs have provided no credible or viable basis to deny NewPath's petition.

## **VI. Reseller Permission to Share a Line**

GTE, U S WEST, and the TRA, in varying ways, each argue that allowing unbundled access to the data portion of resale loops will impose improper restrictions on resellers. In particular, GTE argues that line sharing on resale loops will require data providers to interconnect with the reseller, a non-located carrier. GTE also notes that the Line Sharing Order precludes line sharing on resale loops because it only talks about voluntary CLEC partnering with data providers. Similarly, U S WEST cautions the Commission about direct intervention in the resellers customer relationship. Finally, the TRA argues that requiring ILECs to unbundled the data portions of resale loops would unlawfully impose an unbundling obligation on resellers. As an initial matter, none of the ILECs' or the TRA's concerns about customer interference or reseller permission are implicated when the carrier seeking data access to a resale loop is the voice reseller on the loop. Even outside of this scenario, however, none of the ILECs' or the TRA's arguments are valid as a matter of law or fact.

Contrary to GTE's position, line sharing on resale loops does not require data providers to interconnect with non-located carriers in any way. None of the equipment in a resale circuit is owned or controlled in any way by the reseller. On a resale loop, just as on an ILEC retail voice loop, the only interconnection is between facilities owned and controlled by the ILEC and the located data provider. Moreover, the Commission's mention of voluntary CLEC partnering with data providers in the Line Sharing Order was made in the context of the Commission's discussion of data provider alternatives where the entire frequency range was

being leased as a UNE by the voice providing CLEC. Contrary to GTE's suggestion, this provision in no way precludes unbundled access to the data frequencies on resale loops, where the ILEC is the only provider that has the ability to add data frequencies at marginal cost to the customer's existing voice line.

Similarly, U S WEST provides no explanation how unbundled access to the data portion of resale loops interferes in any way in a reseller's relationship with its customers. Presumably, giving a reseller's customers the option to add competitive data services to their existing phone lines would only enhance a reseller's relationship with its customers. Moreover, to the extent that line sharing on resale loops would result in temporary service outages for data service implementation or testing, it is the customer who requested these steps to be taken to obtain data services. Finally, to the extent line sharing on a resale line interferes with a customer's voice services, a reseller's existing resale arrangement with the ILEC and the Line Sharing Order provide ample recourse to remedy the problem as discussed above.

In much the same way, the TRA's assertion that line sharing on resale loops, without the reseller's consent, improperly requires resellers to unbundle facilities is entirely confused. Resellers have no ownership or control of the facilities that carry the ILEC services that they are purchasing, much less the data frequencies on those facilities. Moreover, under ILEC interpretations of the Line Sharing Order, resellers do not have permission themselves to access the data frequencies on resale loops, much less assume a position where they can grant or deny permission to other carriers. The limitation on unbundled access to the data frequencies of resale loops proposed by the TRA simply make data access on resale loops a two-horse race (the ILEC

and the reseller's data partner) instead of a truly competitive environment. The Line Sharing Order clearly did not contemplate such an arbitrary and discriminatory restriction.<sup>15</sup>

## **VII. No ILEC Data Access Advantage**

Bell Atlantic argues that unbundled access to the data portion of resale loops is not necessary because ILECs do not have any data access advantage. As support, Bell Atlantic claims that CLECs are deploying advanced services as rapidly as ILECs, that cable companies retain their historic lead in broadband access to home, and that, in some cases, an ILECs advanced services are offered solely through an arm's-length affiliate with the same measure of data access as other competing carriers.

Bell Atlantic's arguments are directly contrary to the Commission's threshold findings in the Line Sharing Order. Indeed, it was the Commission's recognition of the ILECs' pronounced data access advantage that drove all of the Commission's conclusions in the Line Sharing Order. Even without considering Bell Atlantic's attempt to re-litigate this issue, its positions are flawed. First, the fact that CLECs are actively deploying advanced services does not disprove that they nevertheless are doing so in the face of a substantial competitive disadvantage held by the ILECs. Second, the market strength of cable operators does not eliminate inequities in data access between ILECs and competitive providers. Finally, while some ILECs are providing service through affiliates, other are not. The Line Sharing Order was designed to eliminate the demonstrated ILEC data advantage where the ILEC has exclusive access to data frequencies on an active voice line. Resale loops clearly reflect this monopoly access.

---

<sup>15</sup> Notwithstanding the TRA's confused unbundling analysis, the organization definitively acknowledges the need for competitive access to the data portion of resale loops. At a minimum, the TRA's comments represent a clear need and desire for a substantial portion of the CLEC community to obtain data access on resale loops, dispelling U S WEST's suggestion that there is no evidence of any such demand.



## VIII. Impairment Standard

U S WEST asserts that “NewPath has made no effort to even try to meet the impairment of Section 252(d)(2) of the Act for the unbundling of a network element.”<sup>16</sup> U S WEST’s claim is a clear misrepresentation. The first section of NewPath’s petition following the Introduction and Summary is devoted entirely to demonstrating the impairment of competitive data providers in the absence of line sharing on resale loops. More than half of the text of NewPath’s petition is a step-by-step analysis of how the Commission’s impairment analysis in the Line Sharing Order applies without distinction to resale loops. Instead of substantively addressing NewPath’s impairment analysis, U S WEST has chosen to ignore it. However, the Commission need not be misled – the impairment analysis is there in black and white, and stands substantively unchallenged.

## IX. Procedural Challenges

SBC and GTE argue that NewPath’s petition for declaratory ruling is inappropriate on procedural grounds.<sup>17</sup> In particular, SBC argues that NewPath’s petition should be denied as an untimely filed petition for reconsideration of the Line Sharing Order. In turn, GTE argues that there is no controversy or uncertainty required for a declaratory ruling under the Administrative Procedures Act (“APA”) and the FCC’s rules, and that NewPath improperly seeks retroactive rulemaking. Neither of the ILECs’ arguments are valid.

The APA and the FCC’s rules authorize the FCC to “issue a declaratory order to terminate a controversy or remove uncertainty.”<sup>18</sup> Contrary to GTE’s claims, NewPath’s petition clearly requests the Commission to terminate controversy or remove uncertainty. The focus of

---

<sup>16</sup> U S WEST Comments at 3.

<sup>17</sup> SBC Comments at 1-2; GTE Comments at 2-3.

<sup>18</sup> 5 U.S.C. § 554(e); 47 C.F.R. § 1.2.

NewPath's petition is the Commission's broadly worded limitation of an ILEC's unbundling obligations under the Line Sharing Order to loops on which the ILEC is the provider of analog voice service. Based on this statement, NewPath asserted that such broad language would invite arbitrary ILEC refusals to unbundled the data portion of resale loops despite the clearly applicable rationales and intent of the Line Sharing Order. In addition to the resistance of the ILECs in interconnection negotiations, the unanimous opposition to line sharing on resale loops by the ILECs in this proceeding demonstrate that NewPath's fears were not unfounded. Moreover, the corresponding unanimous support for unbundled data access to resale loops from commenting CLECs demonstrate a clear controversy. Together, the diverging comments of industry leaders also clearly enforce NewPath's view in its petition that there is a definitive lack of clarity on the full scope of the Line Sharing Order. Whether measured by controversy, a lack of clarity, or both, NewPath's petition falls squarely within the requirements for a declaratory ruling.

NewPath's petition is also not an attempt at retroactive rulemaking as GTE asserts. In support of its claim, GTE points the Commission to AT&T v. Federal Communications Commission, 974 F.2d 1351 (D. C. Cir. 1992) ("AT&T"). In AT&T, AT&T argued that the FCC had not adequately explained a change in its rules on reconsideration and that the change was retroactive rulemaking. While the court noted AT&T's argument about retroactive rulemaking, it remanded the case back to the FCC solely because the Commission had not adequately explained its actions. The AT&T case, therefore, does not give GTE's argument the weight that GTE claims. Moreover, even if the AT&T case were instructive, the Commission's actions in the case are not comparable to the relief that NewPath seeks here. In AT&T, the Commission substantively changed its rules on reconsideration. Here, NewPath simply seeks a

declaratory ruling from the Commission definitively establishing a logical and necessary interpretation of the Line Sharing Order and the line sharing rules as they are currently drafted. This is not retroactive rulemaking; it is ensuring that the Commission's existing rules are implemented to the full measure that the Commission intended.

Finally, the fact that NewPath may have been able to ask for similar relief in a petition for reconsideration, as SBC asserts, does not make its request for declaratory ruling improper. The APA and the Commission's rules clearly provide requests for declaratory rulings as an independent avenue of relief separate from petitions for reconsideration. SBC asserts no support for the proposition that a failure to pursue a petition for reconsideration distinguishes any right for a party to pursue a declaratory ruling. As long as NewPath's petition requests the termination of a controversy or removal of an uncertainty, its choice not to bring its requests in the form of reconsideration does not in any way render its request for declaratory ruling infirm.

NewPath's petition for declaratory ruling is properly before the Commission pursuant to the APA and the Section 1.2 of the Commission's rules. GTE's and SBC's procedural challenges do not withstand scrutiny.

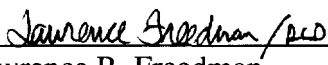
## **CONCLUSION**

None of the comments filed in opposition to NewPath's petition provide any basis for the Commission to deny the declaratory ruling that NewPath seeks. As AT&T points out in its comments, bundled service delivery models are the wave of the future in telecommunications. NewPath's petition is an important stepping stone in the path to achieving true competition for such models. Absent the relief requested, data providers seeking to offer bundled services will have the Hobson's choice of either making a substantial investment in a circuit switched telephony model which may ultimately be obsolete, or alternatively waiting for the advent of a

truly marketable voice over IP solution. The central thrust of the Act, emphasizing a choice of market entry options, suggests that data providers should not be stuck in this position.

For the reasons set forth above, in the supporting comments of AT&T, Sprint, and the TRA, and in NewPath's petition, NewPath respectfully requests that the Commission quickly and definitively rule that an ILEC's unbundling obligations under the Line Sharing Order and 47 C.F.R. § 51.319(h) apply to resale loops.

Respectfully submitted,

  
\_\_\_\_\_  
Lawrence R. Freedman  
Richard Davis  
FLEISCHMAN & WALSH, LLP  
1400 16<sup>th</sup> Street, N.W.  
Washington, D.C. 20036  
(202) 939-7923  
(202) 588-0095 (fax)

Counsel for NewPath Holdings, Inc.

## CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2000, copies of the foregoing Response of NewPath Holdings, Inc. were served on the following parties by hand delivery (\*) or by first class mail:

Magalie R. Salas\*  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

William E. Kennard\*  
Federal Communications Commission  
8<sup>th</sup> Floor  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Susan P. Ness\*  
Federal Communications Commission  
8<sup>th</sup> Floor  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Harold W. Furchtgott-Roth\*  
Federal Communications Commission  
8<sup>th</sup> Floor  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Michael K. Powell\*  
Federal Communications Commission  
8<sup>th</sup> Floor  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Gloria Tristani\*  
Federal Communications Commission  
8<sup>th</sup> Floor  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Lawrence E. Strickling\*  
Chief – Common Carrier Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Michelle M. Carey\*  
Chief - Policy & Program Planning Division  
Common Carrier Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Janice M. Myles\*  
Federal Communications Commission  
Room 5-C327  
445 12<sup>th</sup> Street, S.W. TW-A325  
Washington, D.C. 20554

International Transcription Services, Inc.\*  
1231 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20036

Robert B. McKenna  
Attorney for U S WEST Communications, Inc.  
1020 19<sup>th</sup> Street, N.W.  
Suite 700  
Washington, D.C. 20036

Donna M. Epps  
Bell Atlantic  
1320 North Courthouse Road  
8<sup>th</sup> Floor  
Arlington, VA 22201

Jeffrey S. Linder  
Cheryl B. Carson  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Gail L. Polivy  
GTE Service Corporation  
1850 M Street, N.W.  
12<sup>th</sup> Floor  
Washington, D.C. 20036

Thomas R. Parker  
GTE Service Corporation  
600 Hidden Ridge, MS HQ-EP3J43  
P. O. Box 152092  
Irving, TX 75015-2092

Charles C. Hunter  
Catherine M. Hannan  
Hunter Communications Law Group  
1620 I Street, N.W.  
Suite 701  
Washington, D.C. 20006

Norina T. Moy  
Sprint Corporation  
401 9<sup>th</sup> Street  
Suite 400  
Washington, D.C. 20004

Alfred G. Richter  
Roger K. Toppins  
Mark P. Royer  
Attorneys for SBC Communications, Inc.  
1401 I Street, 11<sup>th</sup> Floor  
Washington, D.C. 20005

Mark C. Rosenblum  
Stephen C. Garavito  
Teresa Marrero  
AT&T Corp.  
Room 1131M1  
205 N. Maple Avenue  
Basking Ridge, NJ 07920

James L. Casserly  
Christopher J. Harvie  
James J. Valentino  
Mintz, Levin, Cohn, Ferris,  
Glovsky & Popeo, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004

  
\_\_\_\_\_  
Richard Davis